APPENDIX A — OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, DIVISION THREE DATED AND FILED SEPTEMBER 30, 2002

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

A093085

(Contra Costa County
Super. Ct. No. C 00-02257)

GARY DEAN et al.,

Plaintiffs and Respondents,

v.

OAKLEY-AVALON, L.P., et al.,

Defendants and Appellants.

Appendix A

A093086

(Contra Costa County
Super. Ct. No. C 00-02040)

GARY ESPINOLA et al.,

Plaintiffs and Respondents,

v.

OAKLEY-AVALON, L.P., et al.,

Defendants and Appellants.

A093087

(Contra Costa County
Super. Ct. No. C 00-02471)

MARCO MANCILLA et al.,

Plaintiffs and Respondents,

v.

OAKLEY-AVALON, L.P., et al.,

Defendants and Appellants.

Four defendants appeal orders denying their petitions to compel arbitration, raising a variety of arguments. We find

that the court did not abuse its discretion in denying their petitions under Code of Civil Procedure section 1281.2,[1] finding that if the arbitration proceeded there was a risk of conflicting rulings on common issues of law or fact. We therefore affirm without considering alternative grounds on which the motion was also denied.

Background

Plaintiffs, six couples and one individual, purchased homes in the Avalon subdivision in Oakley, California in 1998. The subdivision is adjacent to a Pacific Gas and Electric (PG&E) dehydration station that is no longer in use. Plaintiffs allege that the dehydration system polluted the ground water in the subdivision and that the builders and developers of the subdivision knew about but did not disclose the pollution at the time plaintiffs purchased their homes. Named in the complaints as defendants are PG&E, Porter Homes, Western Pacific Housing Corporation, Western Pacific Housing-Porter Division, Hofmann Construction Company, Hofmann Company, Oakley-Avalon, L.P., and Iron House Sanitation Agency.[2] The three complaints that are consolidated on this appeal each allege causes of action for trespass, nuisance

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1. All section references are to the Code of Civil Procedure unless otherwise noted.

2. Iron House is named only in the Dean and Espinola complaints. It is referred to in the complaints and briefs variously as "Iron House" "Ironhouse" and "Iron Horse." Hofmann Construction Company and Hofmann Company are not parties to this appeal. We shall refer to the remaining defendants except PG & E and Iron House as the "developer defendants."

and negligence against PG&E; and for fraud, negligent misrepresentation, violation of Civil Code section 1102, breach of contract, declaratory relief, rescission and reformation against the developer entities. Two of the complaints also allege a ninth cause of action for "Damages" against Iron House Sanitation Agency, alleging that it negligently maintained its sanitation plant in such a way as to cause additional pollution to plaintiffs' property. This appeal is brought on behalf of Oakley-Avalon, L.P., Porter Homes, Western Pacific Housing Corporation, and Western Pacific-Porter Division.

Appellants moved to compel arbitration of all three actions based upon an arbitration provision in the purchase agreements with the plaintiffs. The relevant clauses provide: "In the event of any dispute or controversy between the parties relating to or arising out of this agreement, the property, or the disposition of [the] deposit, then such dispute shall be resolved by binding arbitration in accordance with the provisions of the California Code of Civil Procedure. [¶] . . . This paragraph does not apply to any action for bodily injury or wrongful death, or any right of action to which California Code of Civil Procedure section 337.1 or 337.15 is applicable." This agreement was signed by each of the plaintiffs and by a representative on behalf of Porter Homes. Although the complaints allege an agency relationship between Porter Homes and Oakley-Avalon, L.P., Western Pacific Housing Corporation, and Western Pacific Housing-Porter Division, the existence of such a relationship is in dispute. In each case, the court denied the petition to compel arbitration, finding that the last sentence of the arbitration agreement quoted above is ambiguous and therefore unenforceable against the plaintiffs. The court also found as a second,

independent reason for denying the petition, that "[t]here are multiple parties and the risk of conflicting rulings on common questions or law [*sic*] exist. C.C.P. § 1281.2(c)."

Discussion

Appellants attack the lower court's orders denying their petitions to compel arbitration on numerous grounds. They argue that the court misinterpreted sections 337.1, 337.15 and 1298.7. Section 337.1 provides a four-year statute of limitations for patent construction defects and section 337.15 provides a ten-year statute of limitations for latent construction defects. Section 1298.7 occurs in the title of the Code of Civil Procedure dealing with real estate contract arbitration and provides: "In the event an arbitration provision is included in a contract or agreement covered by this title, it shall not preclude or limit any right of action for bodily injury or wrongful death, or any right of action to which Section 337.1 or 337.15 is applicable." We need not consider how to interpret these provisions—whether contamination or potential contamination is a patent or latent defect, or whether plaintiffs' claims should be regarded as claims of bodily injury—since the court correctly exercised its discretion under section 1281.2, subdivision (c) when it denied the petition to compel arbitration.

Section 1281.2 gives the court discretion to stay or deny arbitration when there are third parties to the litigation who are not party to the arbitration agreement and there is a risk of inconsistent rulings if the arbitration proceeds. The statute provides that the court must enforce an arbitration agreement "unless it determines that: [¶] . . . [¶] (c) A party to the

arbitration agreement is also a party to a pending court action . . . with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. . . . [¶] . . . [¶] If the court determines that a party to the arbitration is also a party to litigation in a pending court action . . . with a third party as set forth under subdivision (c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action . . . ; . . . (4) may stay arbitration pending the outcome of the court action. . . ."

We review the decision of the trial court for abuse of discretion. (*Henry v. Alcove Investment, Inc.* (1991) 233 Cal. App.3d 94, 101.) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.) In *Henry v. Alcove Investment, Inc., supra*, the court applied this standard and affirmed an order staying arbitration. In that case, the issue was whether the defendants had defrauded the plaintiff when they induced him to sign a home loan agreement. In addition to the mortgage company, the plaintiff named as a defendant an individual who had been instrumental in obtaining plaintiff's signature. The loan agreement between the plaintiff and the mortgage company contained an arbitration clause, but it did not apply to the individual defendants. The Court of Appeal found that there were three crucial issues in dispute: (1) whether the individual defendants defrauded the plaintiff; (2) whether the individual

defendants were acting as agents of the corporate defendant; and (3) whether the corporate defendant was liable for the acts of the individual defendants. The court concluded that "the possibility of conflicting rulings on a common issue of fact or law is obvious and the trial court's order is clearly 'in bounds.' " Accordingly, the court upheld the stay of arbitration under section 1281.2, subdivision (c) pending the outcome of the trial against the individual defendants.

In the case at hand, to begin with, it is not clear which defendants are parties to the agreement and would participate in arbitration. Porter Homes is the only defendant signatory to the agreement. On the other hand, the petition to compel arbitration was brought on behalf of all of the developer defendants. Even if arbitration were to include all defendants except for PG&E, Iron House and the Hoffman entities, there would be a risk of inconsistent results. The resolution of the trespass, nuisance and negligence claims against PG&E will entail a factual inquiry as to whether there is any contamination from the dehydration plant and, if so, its extent. Likewise, to succeed in their claims against the developer defendants, plaintiffs will be required to show the extent of any contamination or threat of contamination. The timing of any such contamination will be important to the claims against the developer defendants, but this factual issue, largely dependent on expert testimony, necessarily will also be explored in trying the case against PG&E. If the plaintiffs prevail, it will also be necessary to apportion liability between the various defendants, regardless of the separate theories of liability as against PG&E and the developer defendants. (See, e.g., *C.V. Starr & Co. v. Boston Reinsurance Corp.* (1987) 190 Cal.App.3d 1637, 1642.) Therefore, the trial

court's finding that there is a possibility of inconsistent rulings is amply supported by the record and the exercise of its discretion to deny the petitions to compel arbitration was well within the bounds of reason.[3]

Appellants argue that denying them the right to arbitrate based upon the presence of third parties in the litigation gives plaintiffs the unilateral power to avoid arbitration. However, this very argument was rejected in *Henry v. Alcove Investment, Inc., supra*, 233 Cal.App.3d 94. There the court reasoned that "the Legislature made stay orders in cases involving third parties discretionary in order to avoid the gamesmanship suggested in [defendants'] hypothetical." (*Id.* at p. 102, 284 Cal.Rptr. 255.) The court in *Henry* noted that the existence of third parties does not mean that there

3. In their reply brief, appellants argue that the pending PG & E bankruptcy proceedings will substantially delay the resolution of the litigation, providing an additional reason for which the arbitration should have been compelled. However, while this is a factor, which the trial court might properly consider in determining how to exercise its discretion under section 1281.2, it is not a matter properly raised for the first time on appeal. Although this court, by its order of November 1, 2001, has judicially noticed the filing of the bankruptcy petition on April 6, 2001 and the imposition of an automatic stay, PG & E appears to be going forward with the litigation, as evidenced by its intent to depose the plaintiffs and its joinder in Oakley's motion for a stay based upon grounds independent of the bankruptcy stay, suggesting that the bankruptcy stay may subsequently have been modified or vacated. (See exhibits 11 and 7 attached to Oakley's Petition For Writ of Supersedeas, filed September 5, 2002.) When the trial court reacquires jurisdiction upon conclusion of this appeal, the developer defendants will be free to renew their motion to compel arbitration based upon events that have occurred subsequent to the trial court's initial order from which this appeal was taken.

will be uncritical review by the courts in determining whether arbitration should be denied or compelled, citing to a case in which the California Supreme Court rejected an argument that arbitration should be denied because the plaintiff had named third party defendants. (*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 714.) "[M]erely naming third party defendants not subject to the arbitration agreement '[falls] far short of showing the existence of third party claims which would create "a possibility of conflicting ruling on a common issue of law or fact." ' " (*Henry v. Alcove Investment, Inc., supra*, 233 Cal.App.3d at p. 102.) Here, the trial court did not automatically deny the petitions because there are other defendants, but concluded that in light of the nature of the overlapping claims there was a genuine possibility of inconsistent results if some claims were resolved in arbitration while others were decided in the pending litigation.

Finally, appellants contend that, rather than denying the petitions, the trial court should only have stayed the arbitration pending the outcome of the litigation between plaintiffs and the other parties. However, under section 1281.2, the trial court has discretion, among other alternatives, either to deny the petition or to stay the arbitration. (*Warren-Guthrie v. Health Net* (2000) 84 Cal.App.4th 804, 813.) Here, the trial court reasonably chose the former, apparently being of the view that there will be little, if anything, left to arbitrate after resolution of all issues that must be decided in the litigation. We perceive no abuse of discretion in this decision.

Appendix A

Disposition

The orders denying petitions to compel arbitration are affirmed.[4]

Pollak, J.

We concur:

McGuiness, P.J.

Parrilli, J.

4. Appellants' motion to consider additional evidence and motion requesting court to take judicial notice are granted.

APPENDIX B — ORDER OF THE CONTRA COSTA COUNTY COURTS, SUPERIOR COURT OF CALIFORNIA DATED OCTOBER 20, 2000 AND FILED OCTOBER 23, 2000

CONTRA COSTA COUNTY COURTS
SUPERIOR COURT OF CALIFORNIA

NO. C 00-02257

GARY DEAN, SHERRY DEAN, KEVIN NICHOLAS, TRACY NICHOLAS, PAUL ROA and TAHIRIH ROA

Plaintiffs,

v.

PACIFIC GAS & ELECTRIC COMPANY, a California corporation; PORTER HOMES, a California corporation; WESTERN PACIFIC HOUSING CORPORATION, a California corporation; WESTERN PACIFIC HOUSING — PORTER DIVISION, a California corporation; HOFMANN CONSTRUCTION COMPANY, a California corporation; HOFMANN COMPANY, a California corporation; IRONHOUSE SANITATION AGENCY; a California corporation; OAKLEY-AVALON, L.P., a limited California partnership, and DOES 1-10 AND 12 through 200, inclusive,

Defendants.

Appendix B

ORDER

Date: October 11, 2000
Time: 9:00 a.m.
Dept.: 6

The Motion to Compel Arbitration came on for hearing on October 11, 2000, in Department 6 of the above-referenced court.

The Court having reviewed all pleadings submitted in support and opposition of this motion, and after hearing all arguments therein, the motion to compel arbitration is denied for the following reasons:

(1) The arbitration agreement that does exist is ambiguous. It excludes "any right of actions to which California Code of Civil Procedure ¶¶ 337.1 or 337.15 is applicable." There are two reasonable interpretations fo the clause. The first is that there will be no arbitration if the statute of limitations has expired. The second is that actions for claims described in the two statutes defects are not to be arbitrated. As the clause is construed against the drafter, the second interpretation is adopted and the claims here are not arbitrable; and

(2) There are multiple parties and the risk of conflicting rulings on common questions or law exist. C.C.P. ¶ 1281.2(c)

IT IS SO ORDERED.

Appendix B

DATED: OCT 20 2000

s/ DAVID B. FLINN
Judge of the Contra Costa
Superior Courts

APPENDIX C — ORDER OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, DIVISION THREE DENYING PETITION FOR REHEARING DATED AND FILED OCTOBER 25, 2002

IN THE COURT OF APPEAL OF THE STATE
OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

A093085

(Contra Costa County
Super. Ct. No. C0002257)

GARY DEAN et al.,

Plaintiffs and Respondents,

v.

OAKLEY-AVALON, L.P., et al.,

Defendants and Appellants.

Appendix C

A093086

(Contra Costa County
Super. Ct. No. C0002040)

GARY ESPINOLA et al.,

Plaintiffs and Respondents,

v.

OAKLEY-AVALON, L.P., et al.,

Defendants and Appellants.

A093087

(Contra Costa County
Super. Ct. No. C0002471)

MARCO MANCILLA et al.,

Plaintiffs and Respondents,

v.

OAKLEY-AVALON, L.P., et al.,

Defendants and Appellants.

BY THE COURT:

The petition for rehearing is denied.

Date: s/ [illegible] P.J.

APPENDIX D — ORDER OF THE SUPREME COURT OF CALIFORNIA DENYING PETITION FOR REVIEW DATED AND FILED JANUARY 15, 2003

Court of Appeal, First Appellate District,
Division Three – No. A093085
S111318

IN THE SUPREME COURT OF CALIFORNIA

En Banc

GARY DEAN et al.,

Plaintiffs and Respondents,

v.

OAKLEY-AVALON, L.P., et al.,

Defendants and Appellants.

and companion cases

Petition for review DENIED.

s/ GEORGE
Chief Justice